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January 7, 2003

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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Presentation
CC Docket No. 02-33

Dear Ms. Dortch:

WorldCom, Inc. has been asked to address in more detail the ancillary jurisdiction question posed in the NPRM in the above-referenced proceeding[1] that has received little comment in the otherwise extensive record. That question is whether the Commission would retain the ability to regulate access to bottleneck transmission facilities pursuant to its Title I jurisdiction if it concludes that those facilities are not subject to its Title II jurisdiction when they are being used to provide an "information service." Although WorldCom explained in its opening Comments the substantial difficulties the Commission would face if it attempted to rely on Title I jurisdiction: the proponents of Title I regulation have been notably silent in response.[2] In particular, the ILECs have vigorously urged the Commission to declare it lacks Title II authority and either not to regulate at all,[3] or to regulate minimally (and in unspecified ways) under Title I.[4] But a passing reference by Verizon to one side,[5] they have for the most part refused to answer the question posed by the NPRM: whether the FCC in fact has the *authority* to enact such Title I regulation. No doubt the ILECs are silent on this point because they would be the first to challenge the FCC's jurisdiction if the substance of the Commission's Title I regulation was not to their liking. And while Amazon.com has submitted a legal memo concerning the Commission's Title I jurisdiction to regulate cable modem facilities:[6] that memo only highlights the fact that there is no Title I jurisdiction to regulate wireline carriers.

The difficulty is that Title I confers jurisdiction that "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities."[7] It is not an

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1 ***See*** *NPRM* ¶ **61.**

2 ***See*** Opening Comments at 78-83.
See, *e.g.,* Qwest Comments at 31-32; SBC Comments at 28.

4 See, *e.g.,* SBC Comments at 30; Verizon Comments at 12-13.

5 ***See infra*** **n.12.**

6 Ex Parte letter dated December 2, 2002, Appendix A.

7 *United States v. Southwestern* ***Cable Co.,*** 392 U.S. 157, 178 (1968).

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independent source of regulatory authority or a general grant of power that gives the Commission freedom to regulate activities over which it is not expressly given jurisdiction.[8]

Any attempt to "regulate the Internet" under Title I thus will surely be opposed in the courts as an unlawful extension of the Commission's jurisdictional authority. Critics will correctly point out that the FCC has never attempted to use Title I to support affirmative regulation of the type proposed here. Moreover, courts have set aside regulations premised on the Commission's Title I authority in cases in which the Commission has been unable to prove a close nexus between the communication it wishes to regulate and the promotion or protection of an express Commission authority.

Indeed, while several ILECs assert in passing that the Commission remains free to regulate under Title I if necessary,[9] they are also quick to argue that there is no need for any regulation whatsoever in this area to protect the Commission's regulation of telecommunications services.'" But if there is no ***need*** for Title I regulation to protect the Commission's affirmative Title II rule-making authority, neither is there any *power* to regulate under Title I, since any ancillary regulatory authority would have to be justified by the need to protect or preserve some explicit regulatory authority. Implicit in Qwest's statement that there is no need for Title 1 regulation, then, is its answer to the Commission's question about its *jurisdiction* to issue such regulation: Qwest's view must be that the Commission has no such authority, and if it were to try to exercise any such authority, that exercise would not survive judicial scrutiny.

Where the Commission's Title I authority has been upheld, the courts have been able to identify a direct link between the regulation and a specific statutory responsibility. For example, the courts have upheld the Commission's assertion of Title I jurisdiction over community antenna television as reasonably ancillary to effective performance of its responsibilities for the regulation of broadcasting," and jurisdiction over inside wiring as "reasonably ancillary to

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[8] ***See*** *California v. FCC*, 905 F.2d 1217,1240 n.35 (9th Cir. 1989). *See also NARUC II v. FCC*, 533 F.2d 601, 613 & n.77, 617 (D.C. Cir. 1976) (noting that while § 151 of the Communications Act "does set forth worthy aims toward which the Commission should strive, it has not heretofore been read as a general grant of power to take any action necessary and proper to those ends," and that the "allowance of 'wide latitude' . . . in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer or explicitly denies") (footnote omitted).

[9] *See* supra n.4.

[10] *See, e.g.*, Qwest Comments at 31-32; SBC Comments at 28

[11] *United* States *v. Southwestern Cable Co.*, 392 U.S. at 178.

effective performance" of Commission responsibilities for regulation of interstate communications that must make use of that inside wire."

In a closely relevant factual situation, an appellate court approved the FCC's use of ancillary jurisdiction in *Computer II* to impose on AT&T the requirement that it separate its basic transmission services from its enhanced services. *CCIA v. FCC,* 693 F.2d 198, 213 (D.C Cir. 1982). The Court did so because the separate affiliate requirement was necessary to assure that Title II communications services were offered at reasonable rates. The court found that ancillary jurisdiction was appropriate only because the FCC made detailed factual findings showing "the potentially symbiotic relationship" between the non-Title II enhanced services and the Title 11 transmission services. 693 F.2d at 213. State laws regulating enhanced services were preempted on the same rationale. *Id. See ulso GTE Service Corp. v FCC,* 414 F.2d 124,731 (D.C. Cir. 1973) (regulation of computer services under Title I permitted because computer services "may substantially affect the efficient provision of reasonably priced communications service").[13]

Reviewing this precedent, the Commission itself has stated that its ancillary jurisdiction may be properly asserted *only* where it has "subject matter jurisdiction over the services and equipment involved, *and* the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction."[14] Applying this standard, the Commission, for example, exercised its ancillary jurisdiction over voice mail and interactive menus services (which the Commission has categorized as information services) where necessary to effectuate the purposes of sections 255 and 251(a)(2) of the Act concerning the accessibility of telecommunications services to the disabled. By contrast, the Commission declined to assert

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[12] *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 880 F.2d 422,429 (9th Cir. 1989) (internal quotation marks and citation omitted).

[13] Verizon, the only ILEC proponent of Title I jurisdiction that even acknowledges the Commission's question about its availability, asserts that the *Computer II* appeal decision directly supports Title I jurisdiction here, since in both cases the Commission would move from a regime in which there was rigorous Title II jurisdiction to a more relaxed Title I jurisdictional framework. Comments at 13. But, as we describe above, in affirming *Computer /I,* the court did not rule that it is always permissible to replace Title II jurisdiction with Title I jurisdiction. It ruled that Title I jurisdiction was justified in that case only because continuing regulation of Title I enhanced services was needed to assure proper regulation of Title 11 transmission services. The same showing cannot be made here. *See infra* pp. 5-7.

[14] *See In re Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996,* 16 F.C.C.R. 6417, ¶ 106 (1999) *("'Access to Telecommunications Service Order")* (emphasis added). *See also id* ¶ 95 ("Ancillary jurisdiction may he employed, in the Commission's discretion, where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.").

similar jurisdiction over any other information services, because, in the Commission's judgment, access to these other services (*e.g.*, e-mail and web pages) was not essential to making telecommunications services accessible to the disabled, and, by implication, not essential to implementation of sections 255 and 251(a)(2) of the Act."

When the Commission has been unable to prove that its Title I jurisdiction is essential to the regulation permitted by some other affirmative jurisdictional grant, the courts have struck down the FCC's regulation. For example, in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-709 (1979), the Supreme Court affirmed a decision setting aside Commission rules that compelled cable systems to provide common carriage of public originated transmissions, on the grounds that doing so would convert cable broadcasters into common carriers, an authority the Court concluded needed to come from Congress. If the FCC concludes that when ILECs act as ISPs they too are not common carriers, its efforts to impose affirmative common-carrier-type regulation on ISPs would appear to be foreclosed by *Midwest Video.*

Even when the FCC uses Title I negatively to preempt state regulation, its powers are limited, because they still must be ancillary to some affirmative grant of jurisdiction. Thus, in *NARUC II,* 533 F.2d 601, the Court of the Appeals for the District of Columbia Circuit rejected the Commission's claim that its pre-emption of state and local regulations concerning two-way, non-video communications was reasonably ancillary to its jurisdiction over broadcasting services. The Court had "great difficulty finding any . . . broadcast purpose which is served by the Commission's attempted pre-emption," and found that the Commission's "pre-emption [which would not increase the mix of available cable viewing choices] [did] not directly affect transmission in any medium which is of direct concern under the Commission's power over broadcasting."[16]

Ancillary jurisdiction here would be proper only if the Commission could demonstrate that the regulation of an integrated component of an information service that it has asserted is *not* a telecommunications service is essential to the protection or promotion of the Commission's regulation of telecommunications services under Title II of the Act.[17] The model would he the Commission's Title I regulatory (and deregulatory) treatment of enhanced services and CPE that passed muster in the *Computer II* appeal based on detailed record findings establishing the need for the Title I regulation (or preemption of state regulation) to preserve the Commission's authority over Title II transmission services.[18]

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[15] *Access to Telecommunications Service Order* ¶ 107.

[16] *Id*. at 615.

[17] *See, e.g., California v. FCC,* 905 F.2d at 1241 n.35 ("In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title I1 authority is over common carrier services.").

[18] *See supra* p. **3.**

Here, however, there is no obvious connection between the need for Title I regulation of ILEC loops when used to provide information services, and the preservation of the Title II common carriage regulation that applies to those loops when used to provide telecommunications services. Indeed, the predicate for the Commission's assertion of Title I authority will be that the Commission would have determined (wrongly, in our view) that Internet access services do not themselves utilize common carrier services, a judgment that carries with it the Commission's understanding that Congress believed that no common carrier regulation of such services was appropriate. If the transmission component of Internet access service really is "private carriage," as the Commission tentatively concludes, no Title 11 common carriage interests would be protected by an FCC rule imposing affirmative regulation of any kind on these private arrangements.

Nor would this Title I regulation be necessary to the regulation of those same lines when they are used to provide telecommunications services. To the contrary, the Commission has ample *direct* authority to regulate those lines under Title II. Certainly, nothing in the record here supports any claim that the Commission needs to invoke its ancillary jurisdiction to protect interests set out in Title II of the Act. In other words, a FCC ruling the ILECs that provide information services over their own facilities are to that extent not providing common carriage leaves the Commission without any ground to regulate those facilities when used for that purpose.

In this regard, the situation is entirely different from that present when the Commission used its Title I authority to regulate cable services *before* Congress amended the Communications Act to create a specific regulatory regime to cover cable. Here there is no similar gap to fill. To the contrary, in the deliberations that preceded the 1996 Act Congress considered and *rejected* a proposal to subject facilities used to provide broadband services to a separate regulatory regime.[19] Instead, Congress determined that transmission facilities should continue to be treated under Title II, and it imposed new obligations on incumbents' facilities.

Indeed, any attempt to impose Title I common carrier-type obligations on the ILECs different than the common carrier obligations Congress imposed in section 251 correctly will be seen simply as an unlawful attempt to forbear from enforcing section 251(c) and to avoid the

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[19] Specifically, during the legislative deliberations regarding the Telecommunications Act, the President proposed adoption of a new "Title VII" of the Communications Act that would have established a single regulatory regime applicable to all broadband telecommunications services. The Congress declined to adopt this approach. *Telecommunications Reform Legislation Hearing Before the Subcomm. on Telecommunications and Finance, House Comm. on Energy and Commerce*, 103d Cong. (1994) (testimony of Larry Irving, Assistant Secy. for Communication and Information, Dep't of Commerce) (text available at 1994 WL 213538).

requirements of the 1996 Act.[20] And any attempt to find "section 201-202 lite" in section 152(a) similarly will be seen as an unlawful attempt to avoid by regulatory fiat long-standing binding precedent concerning common carriage. It will not work.

Other Statutory Basis. In a December 2 **ex** parte filed in the cable unbundling proceeding, but submitted in this docket as well, Amazon.com attaches a legal memorandum that takes the position that the FCC has jurisdiction to issue Title I regulation of cable modem service. Notably, the memorandum does not assert that there is jurisdiction ancillary to any Title II authority. Its principal argument to the contrary is that Title I jurisdiction is ancillary to the Commission's express authority set out in Title VI of the Act governing cable communications – a statutory basis that obviously does not apply here in the wireline context, and which we do not dispute.

The memo also references two other possible basis for ancillary jurisdiction – section 706 of the Act, 47 U.S.C. § 157 nt., and the statement of policy contained in the Communications Decency Act, 47 U.S.C. § 230(b). However, the Commission would be hard-pressed to rely on either of these statutory basis here.

As to section 706, the Commission's view, endorsed by the court of appeals, is that "section 706(a) does not constitute an independent grant of . . . authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services." *Advanced Serv. Order,* FCC 98-188, 13 FCCR 24011, 24044-46 (1998) ¶¶ 69-79. *See ASCENT v. FCC,* 235 F.3d 662, **666** nn.7 (D.C. Cir. 2001) (affirming in relevant respect only). Since it is the Commission's view that section 706 only "gives this Commission an affirmative obligation to encourage the deployment of advanced services, relying on our authority established elsewhere in the Act," *id.* ¶ 74, and "does not constitute an independent grant of authority," *id.* ¶ 77, oeither can it be the basis upon which the FCC asserts ancillary jurisdiction, since the FCC obviously may not rely on Title I to issue regulations in support of its regulatory authority under section 706, when it has no such regulatory authority. *Cf. California v. FCC,* 905 F.2d at 1241 n.35 (rejecting FCC's claim that when Congress denied FCC authority to regulate intrastate services under Title II, the FCC nevertheless had the power to regulate under Title I "based on implied authority derived from those [same] powers. . . . [Congress' decision not to grant Title II authority] cannot be evaded by the talismanic invocation of the Commission's Title I authority.").

The cases cited in the Amazon.com legal memo are not to the contrary. While it is true that the Commission referenced section 706 in the *OTARD Extension* ***Order,*** 15 FCC Rcd at 23030, *see* Memo at ix n.36, the FCC had ample authority supporting ancillary jurisdiction there

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[20] *See* 47 U.S.C. § 160 (FCC may not forebear from enforcing section 251 until fully implemented).

wholly apart from section 706, and section 706 was invoked as a reason to exert that authority to promote deployment of advanced services. ***See OTARD*** Order ¶ 104 (relying on §§ 201(b), 202(a), and 205(a)). And the memo's citation to the *AOL* ***Time*** *Warner* ***Order***, 16 FCC Rcd at 6569-70, is mystifying, as the Commission there did not rely on its ancillary jurisdiction, or on section 706, as authority to impose a condition on the merger, hut relied instead on its broad authority "to ensure that the proposed transaction serves the public interest." *See AOL* ***Time*** *Warner Order* ¶ 59 (citing § 214(a)). ***See*** *also* ***id.*** ¶ 60 (stating that FCC's "authority to attach conditions to the proposed transfer" derives from § 303(r) and § 214(c), and not mentioning § 706).

Amazon.com's reliance on the Communications Decency Act as a basis for invocation of ancillary jurisdiction is, if anything, even less persuasive. ***See*** Legal Memo at x-xi. That Act requires ISPs to notify users of parental controls that are designed to block out obscene material, and in the statement of policy that is contained in the Act the Congress stated that promoting blocking and filtering technologies would "promote the continued development of the Internet." 47 U.S.C. § 230(b). It is difficult to understand the claim that the FCC could impose unbundling obligations on the ILECs to aid in the FCC's efforts "to remove disincentives for the development and utilization of blocking and filtering technologies." *Id.* Even if one were to ignore the specific purpose of the Act, its more general command upon which Amazon.com relies states that except to the extent necessary to promote parental controls, regulators should refrain from imposing regulation on the Internet. If anything, this precatory deregulatory command militates *against* the Title I regulatory approach proposed here. It is also difficult to understand Amazon.com's claim that the Communications Decency Act was relied upon to support the FCC's Title I jurisdiction invoked when the FCC adopted rules governing reciprocal compensation for ISP traffic, *see* Legal Memo at xi & n.42, since the FCC's jurisdiction there plainly did not rest on Title I, but on well-established Commission powers under sections 201 and 202 to regulate interstate telephone traffic. The only mention of the Communications Decency Act in that Order came in a footnote describing the so-called "ESP exemption." ***See*** citation in Legal Memo at xi n.41. But the Commission obviously was not suggesting that the Communications Decency Act was the jurisdictional basis for the ESP exemption, if for no other reason than that the "exemption" predated the Act by decades.

In sum, Amazon.com has made the best case for the Commission's reliance on Title I as a basis for creating a regulatory regime governing facilities-based carriers that provide ISP services over their facilities. But what it has shown is that there is in fact no credible basis for Title I jurisdiction over wireline carriers. If the Commission believes that bottleneck

facilities need to be subject to regulation, its only defensible choice is to continue to regulate access to these facilities under Title II.

Sincerely,

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